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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY VINCENT IBARRA,

Defendant and Appellant.

G040439

(Super. Ct. No. 07CF2179)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Thomas M. Goethals, Judge. Affirmed as modified.

Heather R. Rogers, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Barry Carlton and Teresa Torreblanca, Deputy Attorneys General, for Plaintiff and Respondent.

Anthony Vincent Ibarra appeals from his conviction for first degree residential burglary. (Pen. Code, §§ 459, 460.)¹ He contends: (1) the trial court erred by denying his motion for mistrial made after the arresting police officer testified Ibarra had invoked his right to remain silent after being read his *Miranda*² rights; (2) the court abused its discretion by not allowing Ibarra to impeach a witness with evidence concerning facts underlying the witness's prior misdemeanor theft conviction and with the fact the witness had an outstanding arrest warrant for unpaid traffic fines; and (3) the court improperly limited his conduct credit under section 2933.1. We reject his contentions, modify the judgment to award him three additional days of custody credit, and as modified affirm the judgment.

FACTS

Prosecution Case

At about 2:00 a.m., on June 25, 2007, Dale Ridling and his girlfriend, Chelsey Gregory, were watching television in their ground floor apartment, when they heard a noise coming from the master bedroom. They went into the bedroom and saw Ibarra, who had entered through an unlocked sliding glass door, standing in the middle of the room. As Ibarra moved towards Gregory, she ran to the kitchen and grabbed two knives and the telephone. Gregory gave one knife to Ridling, positioned herself holding the other knife in front of the door to her children's bedroom, and called the police.

Ridling told Ibarra to leave. Ibarra kept saying he "just wanted to get through." After a few minutes of wrestling, Ridling succeeded in pushing Ibarra back outside through the bedroom slider, following him through the door into the patio area, and Gregory locked the door behind them leaving both men outside. Ibarra picked up a tricycle, threw it at Ridling, and then headed for the living room sliding glass door,

¹ All further statutory references are to the Penal Code, unless otherwise indicated.

² *Miranda v. Arizona* (1966) 384 U.S. 436.

unsuccessfully trying to open it (as if trying to get back into the apartment). Ibarra then tried to climb over the patio fence. Ridling picked up a different tricycle and threw it at Ibarra, and Ibarra fell over the fence and ran away. Gregory testified Ibarra appeared to be under the influence of heroin or methamphetamine. Ridling testified Ibarra was “wobbling” and “mumbling,” and he appeared “intoxicated.”

When Officer Maybelline Solideo arrived at the scene, she saw Ibarra (who matched the description she had been given) near a parking garage. He began waving her down. Ibarra told Solideo, “‘I’m running after the guys that you were looking for[,]”” making Solideo immediately suspicious of Ibarra because “well, how does he know that we’re looking for somebody? I’m the first one here.” When Solideo asked Ibarra if he lived there, he first responded “‘yes,’” and then “‘no.’” She handcuffed Ibarra and placed him in the patrol car. Later, Ibarra told Solideo he had been in his apartment, when he “‘saw the guys running and chased after them.’” Ibarra was sweating, but he responded coherently, did not smell of alcohol, and did not have a staggered gait. Solideo did not believe Ibarra was intoxicated.

Gregory testified that when she and Ridling went to the police car and identified Ibarra as the culprit, Ibarra told her “he was sorry for breaking into [her] home.” Ridling also testified Ibarra “was saying sorry when he was already arrested” Nothing was taken from Ridling and Gregory’s apartment. There were no signs of a forced entry, and Ibarra had no burglary tools on him when he was arrested.

Defense Case

Ibarra’s defense was that he was too intoxicated to form the mental state required for burglary. A jail nurse testified she ordered Ibarra be monitored for three days for possible alcohol withdrawals. But the order was based solely on Ibarra’s representations to medical staff as to how much alcohol he had consumed. The nurse observed no physical signs Ibarra was in fact intoxicated. A booking officer testified Ibarra was placed in a detoxification cell for about seven hours. Although Ibarra had an

unsteady walk, he otherwise displayed no signs of intoxication—he was talking and responding normally and appropriately, his respiration and level of consciousness were all normal.

A forensic toxicologist testified as to the effects of alcohol and how it is metabolized. Based on a defense hypothetical, the expert opined that a 160-pound man who daily drank 18 beers over a 6-to 12-hour period would have a blood-alcohol-level of between 0.20 and 0.36 percent. The man would be “confused, disoriented, [and] have problems in perceiving.” And when arrested, it would be reasonable for that man to be placed in a detoxification cell and to be monitored for alcohol withdrawal. On cross-examination, the expert agreed that if a person who had consumed an unknown amount of alcohol went into someone else’s house, was chased out, ran away, told police he was chasing the suspect, and then apologized to the residents for having broken into their house, then the person was aware that he had in fact broken into the house.

Information, Verdict & Sentence

Ibarra was charged with one count of residential burglary on a dwelling inhabited by Ridling. The information alleged that pursuant to section 667.5, subdivision (c)(21), Ibarra committed the burglary in the presence of another person (Ridling) who was not an accomplice. (An enhancement allegation Ibarra suffered a prior serious or violent felony conviction was later dismissed.)

A jury found Ibarra guilty of first degree residential burglary as charged in the information. The trial court sentenced him to the middle term of four years. The court agreed with the prosecutor’s statement Ibarra was limited in custody credit to 15 percent of his actual days. Based on 333 custody days, the court awarded Ibarra 48 days of conduct credit for a total of 381 days custody credit. At the same sentencing hearing, due to his violation of felony probation in another case, Ibarra was also sentenced for a possession of a controlled substance conviction.

DISCUSSION

1. *Doyle Error*

Ibarra contends the court erred by denying his motion for mistrial brought after Solideo, while testifying, referred to Ibarra's invocation of his *Miranda* rights following his arrest. We find no error.

We begin with factual background. On cross-examination, the following colloquy took place between Solideo and defense counsel:

“[Defense counsel]: When you took [Ibarra] over to . . . jail to be booked, wasn't he placed in the detoxification cell?

“[Solideo]: That I am unaware of.

“[Defense counsel]: So you don't know about that?

“[Solideo]: No. Because as soon as—we fill[ed] out the paperwork out in the fields [*sic*]. I read his *Miranda*. He refused to talk so I just gave him—

“[Defense counsel]: Your Honor, could we approach?

“[The court]: No, we'll talk about it.

“[Defense counsel]: Okay. I'll reserve.”

Defense counsel asked a few more questions of Solideo, the prosecutor conducted redirect examination, and the witness and the jury were excused. Defense counsel then complained to the court it was improper for Solideo to have mentioned Ibarra's silence after being given his *Miranda* warnings. The trial court observed, “Well, it was not responsive. She did volunteer that information to a question . . . that didn't call for it. It is error. It's not supposed to come out. But I don't think it's error that's reversible, per se.”

The prosecutor stated the comment did not appear to have been intentional; Solideo was simply a new and inexperienced police officer—an assessment with which the court agreed. The trial court struck the testimony from the record, and further observed, “I think there's a little prejudice, but I think it's prejudice that could be cured

by an appropriate admonition. [¶] On the other hand, I don't want to make it bigger than it is. It came out in a matter of seconds. I'm not at all certain that the jury appreciates what [was] even said."

Defense counsel moved for mistrial, which the court denied. The court reiterated it did not believe Solideo's comment was "an atom bomb in terms of fairness[,] and the jury could be adequately admonished to disregard the comment. The court invited defense counsel to research the issue and decide if she wanted a "strong admonition" to the jury.

At the end of trial that day, defense counsel advised the court she would prepare a special written instruction to submit to the jury, and did not want the court to give any other admonishment. The defense special instruction "Cautionary Instruction Evidence Stricken Out" advised the jury: "During the trial, you heard testimony from a witness regarding [Ibarra's] [p]ost-arrest silence after he was advised of his constitutional right to remain silent. [¶] This testimony was nonresponsive and improper and was therefore stricken by the [c]ourt from the record. You are not to consider that evidence at all in your deliberations. [¶] Do not consider for any purpose this evidence and treat it as though you never heard of it."

Ibarra contends Solideo's comment constituted a violation of due process under *Doyle v. Ohio* (1976) 426 U.S. 610 (*Doyle*), requiring reversal. The Attorney General concedes Solideo's comment upon Ibarra's postarrest silence was improper but asserts the error was harmless. We agree the comment was unfortunate but do not believe it constitutes *Doyle* error.

Pursuant to *Doyle, supra*, 426 U.S. 610, "it is fundamentally unfair to use post-*Miranda* silence against the defendant at trial in view of the implicit assurance contained in the *Miranda* warnings that exercise of the right of silence will not be penalized.'" (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 65.) Accordingly, "[t]he prosecutor cannot use the defendant's invocation of his right to remain silent or

refusal to answer questions as evidence against him. [Citation.] Particularly, the defendant's silence may not be used to impeach his credibility. [Citations.]" (*People v. Champion* (2007) 134 Cal.App.4th 1440, 1448.)

A *Doyle* violation has two components: (1) the prosecution must make *use* of the defendant's post-*Miranda* silence for impeachment purposes, either by questioning the defendant about that silence or referring to it in closing argument; and (2) the trial court must *permit* that use. (*Greer v. Miller* (1987) 483 U.S. 756, 761-764 (*Greer*); see *People v. Evans* (1994) 25 Cal.App.4th 358, 367-369 (*Evans*).)

Here, the prosecutor made no attempt to use Ibarra's postarrest silence to impeach him or his defense. Rather, there was a single spontaneous comment by the arresting officer made under questioning by defense counsel, and the testimony was never referred to again.

Furthermore, the trial court did not permit *use* of the unfortunate comment. *Greer, supra*, 483 U.S. at pages 764-765, is instructive. There the Supreme Court concluded brief questioning by a prosecutor concerning a defendant's post-*Miranda* silence (i.e., asking why the defendant had not told his exculpatory story after his arrest) was not a violation of due process when the trial court sustained an objection and admonished the jury. "*Greer* involved the situation in which ' . . . the prosecutor attempted to violate the rule of *Doyle* by asking an improper question in the presence of the jury.' [Citation.] The prosecution put 'an improper question' [citation], but the actions of the trial court there denied the prosecution permission to use the defendant's postarrest silence." (*Evans, supra*, 25 Cal.App.4th at p. 368.)

The cases Ibarra relies upon are not helpful. All of them predate *Greer, supra*, 483 U.S. 756—a case we note Ibarra does not discuss in his briefs. (See *Evans, supra*, 25 Cal.App.4th at p. 367 ["[w]hether *Doyle* error occurred must be considered in light of *Greer* . . . , the most recent treatment of *Doyle* by the United States Supreme Court"].) In *People v. Fabert* (1982) 127 Cal.App.3d 604, 610-611, the trial court not

only erroneously permitted the prosecution to adduce testimony about defendant's exercise of her right to counsel, but then explicitly instructed the jury it could consider her assertion of her rights in assessing her defense of unconsciousness and diminished capacity. In *United States v. Prescott* (9th Cir. 1978) 581 F.2d 1343, the court held the fact defendant refused consent for a warrantless entry of her apartment to apprehend a person suspected of mail fraud could not be used against her to prove she was an accessory after the fact. Not only did the trial court allow the prosecution to introduce the evidence for that purpose, but it refused to permit defense counsel to argue defendant was not obliged to give such consent. (*Id.* at p. 1350.) In *Morgan v. Hall* (1st Cir. 1978) 569 F.2d 1161, 1164-1165, the prosecutor specifically cross-examined defendant concerning his postarrest silence, and although the trial court sustained defense counsel's objections, the prosecutor kept attempting to ask the improper questions. Although the trial court then immediately admonished the jury that defendant had the right to remain silent and it must disregard the specific improper questions, the court of appeals held the trial court's instructions were insufficient to overcome the prejudicial *Doyle* misconduct.

Here, the court struck Solideo's single nonresponsive comment from the record, admonished the jury to disregard the comment, and the prosecutor made no attempt to use the testimony in argument. Although the admonition was not given until the following day, the admonition was clear, and there is no basis in the record to conclude the jury did not follow the instructions of the court. (See *People v. Adcox* (1988) 47 Cal.3d 207, 252-253.) Under *Greer, supra*, 483 U.S. at pages 764-765, the passing unsolicited comment that was neither prompted by the prosecution, nor used by the prosecution in anyway, did not constitute a due process violation under the rationale of *Doyle*.

Having concluded the improper comment by Solideo did not violate Ibarra's constitutional rights, we cannot agree there was otherwise any abuse of discretion by denying Ibarra's motion for mistrial. "A motion for mistrial is directed to

the sound discretion of the trial court. [The Supreme Court has] explained that “[a] mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions.” [Citations.]” (*People v. Cox* (2003) 30 Cal.4th 916, 953, disapproved on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn.22.) The trial court observed the comment was so brief it did not believe most jurors would have even noticed it, and the prosecutor never used the testimony. The court gave the jury the specific admonition requested by Ibarra, telling jurors to disregard the comment. We presume the jury followed that directive. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1005.)

2. *Impeachment of Ridling*

Ibarra contends the court erred by not allowing him to fully impeach the testimony of Ridling. We find no error.

At the beginning of trial, the prosecutor and defense counsel discussed admissibility of prior convictions suffered by Ibarra and Ridling for impeachment purposes. Both had prior theft-related convictions. Defense counsel suggested she be permitted to impeach Ridling with the facts underlying his theft-related conviction—a “high dollar value” speaker was stolen from his public entity employer in 2005. The trial court explained under Evidence Code section 352 while it would not want either man to be permitted a “false aura of credibility,” it would not want to conduct mini trials on the underlying offenses. It suggested an appropriate way to handle impeachment would be to allow questioning about the fact of the prior misdemeanor conviction, assuming the witness was not going to deny the prior conviction, without prolonged reference to the actual facts underlying the convictions. The prosecutor and defense counsel discussed the matter off the record and then agreed the prior misdemeanor convictions would be handled as the court suggested. The prosecutor would bring out on direct examination of

Ridling the fact he had suffered a theft-related misdemeanor conviction in 2005 and two other misdemeanor convictions in 2001; if Ibarra testified, defense counsel would elicit from him the fact he had suffered a theft-related misdemeanor conviction.

Subsequently, defense counsel indicated she also wanted to impeach Ridling with evidence he had an outstanding arrest warrant. The prosecutor explained the warrant was for failure to pay fines associated with violations of the Vehicle Code (driving without a license & lack of proof of insurance). The trial court stated it would not admit evidence of the outstanding warrant because failing to pay “some small fine on [a] traffic case” was not a “*Wheeler*-style act of moral turpitude [¶] . . . [¶] . . . I don’t think it’s really even close”

On direct examination by the prosecutor, Ridling admitted he suffered a theft-related misdemeanor conviction in 2005, and two other misdemeanor convictions in 2001. The jury was given a modified version of the Judicial Council of California Criminal Jury Instructions (2008) CALCRIM No. 316, advising it could consider a witness’s commission of a crime or other misconduct in evaluating the credibility of his testimony.

Ibarra contends the court abused its discretion by not allowing him to question Ridling about the conduct underlying his theft-related misdemeanor conviction and with evidence of the outstanding arrest warrant. It is correct that a witness in a criminal case can be impeached by evidence of the conduct underlying a prior misdemeanor conviction, as opposed to evidence of the conviction itself, if the crime involves moral turpitude. (*People v. Wheeler* (1992) 4 Cal.4th 284, 295, 300; *People v. Lopez* (2005) 129 Cal.App.4th 1508, 1522.) But the admissibility of that evidence is nonetheless subject to the court’s discretionary authority under Evidence Code section 352 to exclude or limit admissibility of the evidence. (*People v. Harris* (2005) 37 Cal.4th 310, 337.) And even when that discretion has been abused, we may not reverse unless we are able to say that absent the error it is reasonably probable the jury

would have reached a result more favorable to defendant. (*People v. Watson* (1956) 46 Cal.2d 818, 836; see Evid. Code, § 354.)

The trial court did not abuse its discretion by limiting evidence of Ridling's prior conviction to testimony he suffered a theft-related misdemeanor conviction. It is only the fact that Ridling committed a crime of moral turpitude that was relevant as it bore on his credibility. The details of the theft were of little relevance and would have necessitated an undue consumption of time.

Nor did the court err by excluding evidence of the outstanding arrest warrants. Ibarra sought to explore the warrant for purposes of showing Ridling had a motive to give testimony favorable to the prosecution. The proffered evidence was of limited probative value. There was no indication the outstanding arrest warrant for unpaid traffic fines had any bearing on Ridling's testimony. There was no suggestion Ridling was given favorable treatment on the outstanding warrant in exchange for testimony in support of the prosecution. The relevance of the proffered evidence to Ridling's bias against Ibarra was highly tenuous, speculative, and conjectural. (See *People v. Johnson* (1984) 159 Cal.App.3d 163, 168 ["[e]vidence of a witness's conduct must *unequivocally* point to a possible motive to fabricate testimony before it is admissible"].)

Furthermore, any error in excluding the evidence to impeach Ridling was harmless beyond a reasonable doubt. There is no dispute about the basic facts of this case—Ibarra's unauthorized entrance into the apartment, his flight, and his apprehension by the police—the only issue was as to Ibarra's mental state. His defense was he was intoxicated and thus unable to form the specific intent required for the burglary charge. Ridling's and Gregory's testimony actually *supported* Ibarra on this point; both testified he appeared to be under the influence or intoxicated.

3. Conduct Credit

Ibarra contends the court improperly restricted his conduct credit to 15 percent under section 2933.1 because it failed to make an express finding the crime was a violent felony under section 667.5, subdivision (c). We reject his contention.

First degree burglary is a violent felony within the meaning of section 667.5, subdivision (c)(21), ““wherein it is charged and proved that another person, other than an accomplice, was present in the residence during the commission of the burglary.’ [Citation.]” (*People v. Garcia* (2004) 121 Cal.App.4th 271, 274 (*Garcia*).) Pursuant to section 2933.1, subdivision (c), a defendant convicted of a section 667.5, subdivision (c) violent felony, “may not accrue presentence conduct credits greater than 15 percent of his or [her] actual period of confinement.” (*Garcia, supra*, 121 Cal.App.4th at p. 274.) Because the limitation on presentence credits under section 2933.1, subdivision (c), is not a sentencing enhancement and does not increase the maximum penalty for first degree burglary, there is no right to a jury trial on the issue and applicability of the conduct credit limitation is left to the sentencing court. (*Garcia, supra*, 121 Cal.App.4th at pp. 279-280.)

Here, the information charged Ibarra in one count with residential burglary on a dwelling inhabited by Ridling. The information separately alleged pursuant to section 667.5, subdivision (c)(21), Ibarra committed the burglary in the presence of another person (Ridling) who was not an accomplice. The jury found Ibarra guilty “as charged in [c]ount 1 of the information.” At the sentencing hearing, the prosecutor noted Ibarra was limited in conduct credit to 15 percent of his actual custody days, and no comment was made by Ibarra’s counsel. The trial court apparently agreed the 15 percent limitation applied because based on 333 actual custody days, it awarded Ibarra 48 days of conduct credit for a total of 381 days custody credit.

Ibarra contends section 2933.1’s limitation on conduct credit may not be applied because the trial court failed to make an express finding the burglary was a

violent felony under section 667.5, subdivision (c). He asserts the failure to make such a finding must be deemed a finding the violent felony allegation contained in the information was “not true.”

Ibarra relies on *People v. Gutierrez* (1993) 14 Cal.App.4th 1425 (*Gutierrez*), but that reliance is misplaced. *Gutierrez* concerned a trial court’s failure to make findings on prior conviction sentence enhancement allegations—findings that section 1158 specifically requires be expressly made by the jury (or trial court if jury trial on the allegations has been waived). The court concluded the required findings were not made and could not be implied from the record. (*Gutierrez, supra*, 14 Cal.App.4th at pp. 1439-1440.)

This case does not involve section 1158 prior conviction enhancement allegations, and there is no similar requirement of express findings contained in section 2933.1. That section simply provides that if the defendant “is convicted of a felony offense listed in subdivision (c) of Section 667.5[.]” then the defendant may not be awarded conduct credit of more than 15 percent.

Here, there is no doubt Ibarra was convicted of a violent felony under section 667.5, subdivision (c). The information specifically charged in count 1 Ibarra committed a residential burglary on a dwelling that was inhabited by Ridling, and the jury found him guilty “as charged” in count 1. There is no dispute as to the facts that Ridling was present and was not an accomplice. At sentencing, the prosecutor specifically mentioned the 15 percent limitation on conduct credit, defense counsel made no comment, and the court restricted the conduct credit accordingly. Thus, there is no doubt on this record the court found section 2933.1 to be applicable and the conduct credit limitation was properly applied.

Ibarra also contends, and the Attorney General agrees, the trial court improperly calculated Ibarra’s actual days in custody. He was credited with 333 actual custody days and, based on the 15 percent limitation, awarded 48 days of conduct credit

for a total of 381 days custody credit. Ibarra should have been credited with 334 actual custody days and 50 days of conduct credit for a total of 384 days custody credit. We have reviewed the record and agree Ibarra is entitled to the additional three days of custody credit and order the judgment modified accordingly.

DISPOSITION

The clerk of the superior court is directed to prepare an amended abstract of judgment to reflect that defendant is entitled to 334 days of actual custody credit and 50 days of conduct credit, for a total of 384 days custody credit, and to forward a certified copy of the amended abstract of judgment to Department of Corrections and Rehabilitation, the Division of Adult Operations. In all other respects, the judgment is affirmed.

O'LEARY, J.

WE CONCUR:

SILLS, P. J.

RYLAARSDAM, J.